1978

Bank of Salt Lake, A Utah Corporation, And Norton Parker, An Individual v. Globe Leasing Corporation, A Utah Corporation; Al Weigelt And Gloria Morrison, Individuals : Petition For Rehearing And Brief

Utah Supreme Court

McRAE & DeLAND
Attorneys for Respondents
72 East Fourth South, #355
Salt Lake City, UT 84111
364-1333

IN THE SUPREME COURT OF THE STATE OF UTAH

BANK OF SALT LAKE, a Utah corporation, and NORTON PARKER, an individual,

Defendants-Appellant,

v.

GLOBE LEASING CORPORATION, a Utah corporation; AL WEIGELT and GLORIA MORRISON, individuals,

Plaintiffs-Respondent.

Case No. 15337

PETITION FOR REHEARING AND BRIEF

LONI F. DeLAND
McRAE & DeLAND
72 East Fourth South, #355
Salt Lake City, UT 84111
Attorneys for Respondent

ROBERT M. ANDERSON
DOUGLAS MATSUMORI
VAN COTT, BAGLEY, CORNWALL
& McCARTHY
Attorneys for Appellant
141 East First South, #300
Salt Lake City, UT 84111

McRAE & DeLAND
Attorneys for Respondents
72 East Fourth South, #355
Salt Lake City, UT 84111
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BANK OF SALT LAKE, a Utah corporation, and NORTON PARKER, an individual,

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PETITION FOR REHEARING AND BRIEF

Plaintiffs-Respondent respectfully submit that the Court has erred in its application of the rules of appellate review and has failed to perceive the facts of the above captioned matter, all as more specifically set forth in the Brief attached hereto.

DATED this 29 day of December, 1978.

Loni F. DeLand
McRAE & DeLAND
72 East Fourth South, #355
Salt Lake City, UT 84111
Attorneys for Respondent

BRIEF IN SUPPORT OF PETITION FOR REHEARING

Respondent files this Petition for Rehearing fully realizing that such petitions are rarely granted. This petition, however, is filed because we respectfully believe that the Supreme Court by its decision has overlooked important facts upon which the Court below based its decision and that stare decisis further requires a review of the quoted case law.

1. On page three of this Court's decision you note that "the trial court could find that the bank technically breached its contract with the plaintiff; however, there is no basis for holding that the breach caused damages in the sum of $50,000 to the plaintiff." Chief Justice Ellett then continued "that since the plaintiff was capitalized for only $3,000, had tried and failed to obtain financing from institutions prior to being financed by the defendant-appellant and had not, after nearly one year of operation, shown any profits, the award of $50,000 was excessive and that only nominal damages could be shown."

We call the Court's attention to the testimony of plaintiff's expert witness, Frank K. Stuart. At page 86 of the abstract of the trial transcript, Mr. Stuart's testimony was that Mr. Weigelt had been drawing a salary of $1,000 a

month and that his wife's salary was $500 a month. Given that figure alone over a period of one year the Court was in error to fail to consider such to be profits in this wholly owned corporation. Furthermore, it is common knowledge that many of the successful businesses of our time all started on a shoe string.

Given the logic of the Court that we must determine future profits of a business using the first year's operation as a guide would be to deny that Maurice Warshaw's roadside fruit stand would ever develop into the vast business empire that it is today, or that Willard Marriott's first Hot Shoppe would ever make him the successful businessman that he is today. It has long been the rule of this Court in applying rules of appellate review that the findings of a lower court would not be disturbed if supported by evidence and testimony since it is that court that has the opportunity to weigh the testimony at the trial. It was at that very trial that the defendants had the opportunity to controvert the expert testimony of Mr. Stuart as to prospective profits through cross-examination or through their own experts which they failed to do. It is therefore implicit in the finding of the court below that the court relied on Mr. Stuart's application of the ten-year rule, a rule which is accepted by the Tenth Circuit Court of

Appeals. Cf Randy's Studebaker Sales, Inc. dba Randy's Datsun Sales v. Nissan Motor Corp. In U.S.A., 533 F.2d 510 (1976), et al.

We respectfully request that in considering this Petition for Review that the Court reexamine that testimony of Mr. Stuart upon which the theory of projected profits is based; particularly pages 59-65, 72-74, 85 and 86 of the abstract wherein Mr. Stuart makes it very clear that fledgling businesses must be judged over a period of years, and not in their infancy, as to what their expected profits shall be. If this is not a sound economic approach to measuring damages, where is the contrary evidence?

2. Although respondent's theory is novel it is certainly not without precedent. Even this Court recognized that damages may be awarded for lost profits in Gould v. Mountain States Telephone and Telegraph Company, 309 P2d 802 (1957). We would ask that this Court also review the case law as to that theory quoted in the brief submitted by plaintiff-respondent on January 23, 1978.

3. As to this Court's assertion that the bank's notice was of no consequence, we would once again point out to the Court that the Court below found the cited, recorded provision of the assignment which begins at the bottom of

page 2 of the decision, "For Like Consideration and said BANK OF SALT LAKE is authorized and empowered to collect all sums of money presently due or that at any time hereafter may become due and owing as rental under the provisions of said lease and to receipt therefor, as fully and completely and for all purposes as the undersigned might, or could, have done had this assignment not been made and given," that the court below found this to be a security device to be used only when plaintiff was in default. We know from the briefs already submitted and the argument before this Court that there was in fact no default on the part of the defendant at the time of the Bank's breach.

We once again respectfully submit that defendant has met the burden of proving that lost profits were not speculative nor uncertain and that the defendants' acts constituted a tortious interference with plaintiff's business relations as did the District Court so find. To deny Globe the relief sought would effectively deny any protection to a new business from such tortious acts and would have them at the mercy of their creditors or other parties with whom they contract. Accordingly we respectfully request this case be reheard by this Court and that the judgment of the Third Judicial District Court be upheld.

RESPECTFULLY SUBMITTED this 2 day of January 1979.

Loni F. DeLand
McRAE & DeLAND
72 East Fourth South, #355
Salt Lake City, UT 84111
Attorneys for Respondent

DELIVERED two copies of the foregoing Petition For Rehearing and Brief this 2 day of January, 1979, to Robert M. Anderson of Van Cott, Bagley, Cornwall & McCarthy, Attorneys for Appellant, 141 East First South, Salt Lake City, UT 84111.

Loni F. DeLand